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No. 87-1358

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.,
and
SILVER CONSTRUCTION, INC.,
Petitioners

v.

M. MARK MENDEL, Individually
DANIEL E. MURRAY, Individually, and
M. MARK MENDEL, Limited,
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Petition for Certiorari noted at page 9, n. 4, that, among the twelve courts of appeal, only the District of Columbia and the Sixth Circuit had not considered the pattern of racketeering question posed by footnote 14 of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). On February 12, one day after the Petition for Certiorari was filed, the District of Columbia Court of Appeals handed down its decision in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs and Helpers Local Union 639*, 1988 Westlaw 9710 (D.C. Cir. February 12, 1988).[1] In *Yellow Bus Lines*, the Court held that a four day labor racketeering scheme with the narrowly defined goal of intimidating an employer into recognizing a union satisfied the "pattern" requirement. In so holding, the Court of Appeals aligned itself with the Second, Fourth, Fifth and Ninth Circuits in adopting the less restrictive view of the pattern requirement, *see* Petition for Certiorari, at 11-14, and further widened the differences among the eleven courts of appeal that now have considered the pattern issue in the two and one-half years since *Sedima* was decided.

Yellow Bus Lines arose out an employer's refusal to bargain with Local 639 of the Drivers, Chauffeurs and Helpers Union. The Union called a strike during which the Union's business agent and some of the strikers threatened to burn the company's buses. At the request

1. This Supplemental Brief is filed under Supreme Court Rule 22.6 which provides that "[a]ny party may file a supplemental brief while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing." Petitioners filed their Petition for Certiorari on February 11, 1988, and the *Yellow Bus Lines* decision that is the subject of this Brief was decided on February 12, 1988.

of management, the local police arrested the business agent on criminal charges stemming from the threats. After the strike was settled, the business agent brought civil claims against management for false arrest and abuse of process. Management filed counterclaims alleging civil-RICO claims and state law tort claims. In a *pre-Sedima* ruling, the trial court dismissed the civil-RICO claims for failing properly to allege the enterprise element of the claim and for failing to allege "racketeering injury". Shortly afterwards, Yellow Bus moved to amend its Complaint to cure these pleading deficiencies and the Motion was denied as "too late".

The state law counterclaims were tried and substantial verdicts were returned for the bus line. On appeal, the Court of Appeals reversed the judgment of the District Court dismissing the civil-RICO claims and refusing to permit the filing of amended pleadings.

The *Yellow Bus Lines* decision is significant in two respects. *First*, the Court considered the pattern of racketeering issue that the intervening *Sedima* decision posed. In so doing, the Court had little difficulty in concluding that four predicate criminal acts committed over a very short period of time in a single, isolated scheme to intimidate an employer in a labor dispute satisfied the pattern of racketeering guidelines suggested in footnote 14 of *Sedima*:

> "[The Complaint alleges] four . . . direct threats to Yellow Bus property or employees which qualify as offenses listed in the section 1961(1) definition of racketeering activity. Additionally, these predicate acts appear to fulfill the requirement for a 'pattern' — 'continuity plus relationship' — as stated in the Senate Report. The definition of 'pattern' of conduct, provided by Congress later in the same bill, indicates that this term embraces 'criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission . . . and are not

> isolated events." 18 U.S.C. §3575(e) (1982). See also *Sedima*, 473 U.S. at 496 n. 14. Here, appellees are accused of engaging in acts of vandalism and intimidation during a specific time period in pursuit of a unitary goal. We believe this scenario meets the statutory requirements for a 'pattern of racketeering activity'." ____ F.2d at ____ (p. 6, Westlaw opinion).

Under the *Yellow Bus Lines* analysis, the Complaint in this action indisputably would have met the pattern of racketeering requirement. Like the union thugs in *Yellow Bus Lines*, Mendel, his partners and his law firm engaged in a series of predicate criminal acts with a single goal putting Marshall Silver out of business in retaliation for its failure to pay a disputed contract claim. The only significant difference is that the respondents' scheme spanned seven months and the labor scam took place over the course of a few days.

Second, like the District Court in this case, the District Court in *Yellow Bus Lines* refused to permit the filing of amended pleadings at an early stage of the case despite the policy of liberal amendment of pleadings mandated by Rule 15, F.R.C.P. In this case, petitioners requested leave to amend the Complaint to allege that respondent Mendel had engaged in a second, separate scheme to corrupt the judicial process in the event that the court considered such activity necessary to meet the pattern of racketeering requirement. The District Court refused to permit the filing of an amended complaint, and the Third Circuit affirmed its refusal with the cryptic and flatly incorrect statement that claims of racketeering activity unrelated to petitioners "would fail, in the context of this suit, to meet either the requirement of relationship or that of continuity." *Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63, 67, n.5 (3d Cir. 1987).

For all of the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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